Co., 158 Fed. 941. A transfer of personalty for other personalty than money may not constitute a sale for every purpose. See *Thornton* v. *Moody*, 24 S. W. 331, 333 (Tex.). But the sort of transaction indulged in by the defendant in the principal case falls within the intended prohibition of the local option laws, and the decision seems correct.

STATUTE OF FRAUDS — SUFFICIENT MEMORANDUM — SIGNED BY DEFENDANT ONLY. — The memorandum of a contract for the sale of grain was signed by the vendor, but not by the vendee, who seeks to enforce it. The Idaho statute of frauds provides that such an "agreement is invalid, unless the same or some note or memorandum thereof be in writing and subscribed by the party charged, or by his agent." REV. CODES, IDA., § 6009. *Held*, that the plaintiff, not having signed himself, may not recover. *Kerr* v. *Finch*, 135 Pac. 1165 (Ida.).

Both this decision and the one it follows are admittedly against the great weight of authority. *Kerr* v. *Finch*, *supra*, 1165; *Houser* v. *Hobart*, 22 Ida. 735, 127 Pac. 997. The provision in question is practically § 17 of the Statute of Frauds (St. 29 Car. II, c. 3). The same question arises where it is sought to charge a vendee when he but not the vendor has signed. *Old Colony R. Corp.* v. *Evans*, 6 Gray (Mass.) 25; *Mason* v. *Decker*, 72 N. Y. 595; so too where the subject matter is realty. *Hodges* v. *Kowing*, 58 Conn. 12, 18 Atl. 979; *Richards* v. *Green*, 23 N. J. Eq. 536. The overwhelming majority of cases construes the "party charged" to mean the one sued on the agreement. *Schneider* v. *Norris*, 2 M. & S. 286; *Bristol* v. *Mente*, 79 N. Y. App. Div. 67, affirmed 178 N. Y. 599; *Morrison* v. *Browne*, 191 Mass. 65, 77 N. E. 527; *Harper* v. *Goldschmidt*, 156 Cal. 245, 104 Pac. 451. Idaho and Michigan, however, find a fatal want of mutuality under these circumstances. *Houser* v. *Hobart*, *supra*; *Wilkinson* v. *Heavenrich*, 58 Mich. 574, 26 N. W. 139. This view patently overlooks the fact that the statute concerns the proof, and not the existence, of the bargain, for the memorandum does not constitute the contract, but only evidences it. *Thayer* v. *Luce*, 22 Oh. St. 62; *Charlton* v. *Columbia Real Estate Co.*, 67 N. J. Eq. 629, 60 Atl. 192. The court here, indeed, asserts that the local statute has changed the substantive law in this respect also. But it is submitted that the use by the legislature of words already construed almost everywhere to have a certain meaning, shows an intent to use the words in that sense. *Ryalls* v. *Mechanics' Mills*, 150 Mass. 190, 22 N. E. 766. See *Rhoads* v. *Chicago & Alton R. Co.*, 227 Ill. 328, 334, 81 N. E. 371, 373. The court's argument, that it is unjust to allow the holder of a signed memorandum to insist on or deny the contract as he chooses, should be addressed rather to the legislature.

TENANCY IN COMMON — CO-TENANT'S LIEN INFERIOR TO A PRIOR MORTGAGE LIEN. — Prior to a partition suit by one tenant in common the other co-tenant mortgaged his undivided share. *Held*, that the mortgagee's lien on this undivided share of the land was superior to the co-tenant's lien on that share for his portion of the rents and profits collected. *Knecht* v. *Knecht*, 58 Oh. L. Bull. 680.

A tenant in common holds the legal title to an undivided share of the property. See 1 TIFFANY, REAL PROPERTY, § 163. Consequently a mortgage by one will attach only to the mortgagor's undivided share. See *Bigelow* v. *Topliff*, 25 Vt. 273, 286. It is unsettled whether one co-tenant has a lien for rents and profits on the other co-tenant's share of the land. Some courts deny any lien whatsoever. *Vaughan* v. *Langford*, 81 S. C. 282, 62 S. W. 316; see cases collected in 17 AM. & ENG. ENCYC. 697. But, on the other hand, a few jurisdictions do recognize an equitable lien. *Hannan* v. *Osborn*, 4 Paige (N. Y.) 336; *Beck* v. *Kallmeyer*, 42 Mo. App. 563; *Arnett* v. *Munnerlyn*,

71 Ga. 14. See *Peck* v. *Williams*, 113 Ind. 256, 260. Such a lien is merely a remedy to prevent unjust enrichment. See *Arnold* v. *Porter*, 122 N. C. 242, 244, 29 S. E. 414, 416. No doubt the co-tenant out of possession has a personal claim against the other for his proportionate share of the proceeds. *Cutler* v. *Carrier*, 54 Me. 81. But these rents and profits spring out of the common estate, and the claim for them is so closely connected with the land that it seems more just that a preference be given as to this land over the other co-tenant's general creditors. The reasoning is analogous to that on which a vendor's lien is based. In the same way in owelty of partition by giving an equitable lien on the purport. *Baltimore & Ohio R.* v. *Trimble*, 51 Md. 99. It is submitted therefore that a lien should be given here. But as the lien is imposed only in equity, the mortgage should be preferred. *McArthur* v. *Scott*, 31 Fed. 521. One court argues that the mortgagee takes with constructive notice of the rights of the co-tenant, and so is postponed. See *McCandless' Appeal*, 98 Pa. 489, 494. But it seems unjust to charge one with notice of a lien unrecorded, the very existence of which may be impossible for the mortgagee to discover due to his inability to learn the state of accounts between the co-tenants, which may not even be known to themselves. The Missouri and Indiana courts, in saying (*Beck* v. *Kallmeyer*, *supra*, *Peck* v. *Williams*, *supra*) that each co-tenant, being seized *per my et per tout*, holds a contingent interest in the entire title which neither can encumber until their equities are adjusted, allow what is substantially a legal lien, although speaking of it as an equitable lien. This is open to the same objection of public policy against giving preference to a right of so indefinite a nature. The result of the principal case, therefore, seems correct.

TORTS — UNUSUAL CASES OF TORT LIABILITY — APPLICATION OF RULE OF FLETCHER *v.* RYLANDS TO ACTS UNDER PUBLIC FRANCHISE. — The defendant maintained high pressure water mains in the public streets under a private act of Parliament providing that nothing in the act should exempt the company from liability for any nuisance caused by it. The plaintiff's electric cables under the same streets were damaged by the bursting of the defendant's mains without negligence on the part of the defendant. *Held*, that the defendant is liable for the damage. *Charing Cross, etc. Electricity Supply Co.* v. *London Hydraulic Power Co.*, [1913] 3 K. B. 442.

In England, and in those American jurisdictions accepting the doctrine of *Fletcher* v. *Rylands*, a landowner is not held absolutely liable for damages resulting from non-natural and hazardous user of land in undertakings conducted under express public authority, apparently on the ground that the legislature contemplated possible damage and condoned it by anticipation. *National Telephone Co.* v. *Baker*, [1893] 2 Ch. 186; *Lake Shore & M. S. Ry. Co.* v. *Chicago, L. S. & S. B. Ry. Co.*, 48 Ind. App. 584, 92 N. E. 989. A sound basis for these cases, however, seems to be that the public interest in the undertakings makes unwise the application to them of the exceptional doctrine of *Fletcher* v. *Rylands*. Where, however, as in the principal case, the words of the statute expressly negative the company's exemption from liability for any nuisance, the courts have held the company responsible, regardless of negligence, for damages caused by the hazardous user. *Midwood & Co., Ltd.*, v. *Manchester Corporation*, [1905] 2 K. B. 597. Though it is doubtful if the word "nuisance" can be construed to cover what is not nuisance at all, it is apparent from the history of the cases that the legislature intended to hold the company to a strict liability and hence inferentially abrogated the rule that the public interest makes the doctrine of *Fletcher* v. *Rylands* inapplicable. The fact that the parties in the principal case are not adjoining landowners but co-users of the highway affords no basis for distinguishing this case from *Fletcher* v. *Rylands*, since both the plaintiff and the defendant have undoubted rights in the land, and the hazard-